SUPREME COURT, U.S.
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JOSEPH F. SPANIOL, JR.

No. 87-154

In The

Supreme Court of the United States

October Term, 1987

JOSHUA DeSHANEY, a Minor, by his Guardian ad litem, and MELODY DeSHANEY,

Petitioners,

vs.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER and CHERYL STELSE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

This case presents the following questions for review:

1. Whether a child known by the public child protection officials to be in serious danger of abuse or neglect, and whom the authorities actually undertake to protect from a specific danger, enjoys a constitutionally protected right under the Fourteenth Amendment to at least minimum standards of protection from physical abuse and neglect.

2. Whether the aggravated misconduct of public child protection officials (whether designated gross negligence, deliberate indifference, or willful and wanton misconduct) suffices to trigger the protections of the Due Process Clause.

3. Whether the deliberate refusal of child protection officials to act to protect an identified individual child already under their auspices, and actually known to them to be in extreme danger of death or profound injury from an identified and known imminent danger, can be sufficiently reckless, deliberately indifferent, grossly negligent or willful and wanton as to impose liability under 42 U.S.C. 1983.

4. Whether egregious misconduct of public officials, rising to the level of gross negligence, deliberate indifference, or willful and wanton misconduct, leading to massive personal injury to an infant citizen, is excluded from the application of the civil rights laws on the basis that the misconduct was omissive in nature.

PARTIES

All parties to this proceeding in this Court, and in the Court below, are identified in the caption. Not identified are Randy DeShaney, the abusing parent, who was a party defendant in the original Complaint, and the State of Wisconsin, which was dismissed by the trial court as a party defendant. Mr. DeShaney was until recently incarcerated by reason of the matters involved herein.

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OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals in this matter is reported at 812 F.2d 298 (7th Cir. 1987), and is set forth at pages 36 - 46 of the Petition for Writ of Certiorari. The district court's opinion was not published, and it is set forth at pages 47-75 of the Petition for Writ of Certiorari.

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JURISDICTION

a) The Writ of Certiorari issued upon a Petition seeking review of a judgment of the Court of Appeals for the Seventh Circuit, which was entered on February 12, 1987.

b) The Seventh Circuit entered its Order Denying Rehearing on April 21, 1987. No Order was entered extending the time for filing the Petition for Writ of Certiorari.

c) The Petition for Writ of Certiorari was filed with this Court of July 17, 1987, and the Writ issued March 21, 1988.

d) Petitioners believe this Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. 2101.

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STATUTES INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It also involves 42 U.S.C. § 1983, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It also involves the Wisconsin Children's code, Chapter 48, and particularly § 48.01 and § 48.981 thereof. In view of their length they are set out in full in the Appendix to this Brief.

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STATEMENT OF THE CASE

A) The Course of the Proceedings Below

The Complaint in this action (J.A. 2) was filed in the United States District Court for the Eastern District of Wisconsin on March 4, 1985. Defendants answered (J.A. 18) on March 29, 1985 and subsequently filed a motion to dismiss (J.A. 30) on October 23, 1985 which the court converted to a motion for summary judgment. (J.A. 86) The

court granted the motion for summary judgment on June 20, 1986. (Petition for Writ of Cert., 76)

The district court considered and rejected the rule of *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3rd Cir. 1985) and held the relationship between the defendants and the child could not give rise to a constitutionally protected right of protection. (Petition for Writ. of Cert., 47-75)

A Notice of Appeal to the Seventh Circuit Court of Appeals was filed July 18, 1986.

The Seventh Circuit also rejected *Bailey, supra,* and held that, although the authorities "inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father," (Petition for Writ of Cert., 44), the child had no constitutionally protected right which was violated thereby.

The Seventh Circuit's opinion affirming the district court was issued February 12, 1987. (Petition for Writ of Cert., 36-46) The Court denied rehearing and rehearing en banc on April 21, 1987. (Petition for Writ of Cert., 80)

B) The Factual Background of the Case

- Summary -

Four-year-old Joshua DeShaney became totally and permanently brain-damaged as of March 8, 1984, because of the cumulative effects of a continuing process of physical abuse commited upon him by his father and the father's paramour over a long period. Fourteen months before his injuries became irreparable the local child protection agency began the active phase of its case management of

Joshua's physical abuse and neglect situation, initially arranging for protective custody for his physical protection from abuse; the defendant officials returned him to the abusive home, on their own decision and without court action, and actively followed him at all times thereafter, dutifully recording in internal documents the child's deteriorating situation and their fears for his safety but taking no action whatever to protect the child.

- Details -

In January of 1982 the respondent Winnebago County Department of Social Services (hereinafter DSS) was notified, via the police department, that one Randy DeShaney was abusing his tiny son Joshua (the infant petitioner herein). (J.A. 152-153) The DSS had a special division, the Child Protection Unit, whose precise function was to identify and protect endangered children. (J.A. 110) (This was in response to the declared policy of Wisconsin law mandating specific efforts to protect endangered children and intervene on their behalf). (App. 1, *infra*) The DSS on this occasion interviewed the father, who denied the assertions against him, but did not see the child, despite the statute's requirements; DSS did nothing further and closed its file.

In January, 1983, Joshua was seen in a local emergency room as a victim of child abuse, and the DSS was notified. (J.A. 111, 157) At this time DSS arranged for temporary legal custody of Joshua to be taken, nominally by the hospital, while the County investigated. (J.A. 111, 157) The investigation resulted in a multidisciplinary team meeting, at which the physicians, the child psychologist, the nurses, the police officers, the DSS caseworker and DSS supervisor (individual respondents herein), and

the county's civil attorney were in attendance. (J.A. 113, 158-159) Despite major indications of abuse (J.A. 112-113, 156-160), the county civil attorney announced that he was unwilling to bring this matter to court for any level of child protection whatever, for undocumented reasons. The DSS officials filed their internal report, noting that child abuse was strongly suspected and promising that they would continue actively and closely to monitor the child. (J.A. 159-160) Most especially, these respondents promised that they would bring Joshua to the Court for protection at the first additional indication of child abuse, with respondent Kemmeter saying in her report:

> "I therefore recommend that the temporary physical custody order and any further allegations against this family be dismissed *at this time but will refer it back into Court should there be any further injuries to this child of an unexplained origin.*" (Emphasis supplied). (J.A. 159-160)

The County gave up any thought of custody of Joshua and, on its own initiative and without a hearing, handed him back to his abusing father and the father's abusing girlfriend. The County did so although it had reason to know each of them was abusive, "because of lack of ability to substantiate" abuse. (J.A. 114)

The County DSS also entered into a contract with the father whereby he was to receive certain counseling, remove the girlfriend from the home, and enroll Joshua in Head-Start (thus providing independent monitoring of the child's condition). (J.A. 113) This agreement between the County DSS and the father for Joshua's benefit was ignored as soon as it was made, yet no action was taken by DSS. (J.A. 116-117)

Over the next fourteen months Joshua was seen repeatedly in hospital emergency rooms for suspicious traumatic injuries. (J.A. 129-130, 143, 184-186) On November 30, 1983, the emergency room physician directed the ER nurses to file a written child abuse report on Joshua, which they did. (J.A. 120, 194) This report was communicated to the DSS caseworker, but nothing was done to follow up on it. (J.A. 120) DSS did not interview the family or observe the child about this formal medical report of child abuse, despite a clear statutory mandate to do both. (*See* § 48.981, App. 2, *infra*)

On another occasion a Head Start worker (still trying to get him enrolled pursuant to the agreement) found four-year-old Joshua alone at home, and telephoned DSS two separate times to inform them of his immediate jeopardy, yet no action whatever was taken. (J.A. 119, 177) The worker again telephoned a third time the following day and spoke directly to the caseworker (respondent Kemmeter), describing how she had found Joshua alone and unsupervised, with no idea where the adults were or when they might return. Still no action of any kind was taken.

Throughout this time DSS maintained an open casefile on Joshua, and assigned a Child Protection Unit worker to his case. (J.A. 106, 110-121) She (respondent Kemmeter) visited the home several times (although not in keeping with the Department's own guidelines). (J.A. 110, 116, 118) She claims to have had a close and caring relationship with Joshua: she would hold him on her lap and read to him. (J.A. 103) She repeatedly documented in her casefile her continuing belief that Joshua was in danger, that she did not believe the excuses proffered by

the adults for the frequent injuries to Joshua, and that she was extremely worried about him. She and DSS did nothing. (J.A. 108-109, 116-121, 129)

Kemmeter consistently violated the requirements of both good social work and her own agency by visiting Joshua rarely and intermittently. (J.A. 104) For the last three months of his conscious life, she even neglected to see Joshua himself on the few occasions when she did go to his home, instead in each instance accepting an excuse about his having a cold or being asleep in the middle of the day. (J.A. 131)

The caseworker herself observed what she has repeatedly described as cigarette burns on Joshu's face. (J.A. 130) As she later told the Family Court, "On November 9, 1983, the petitioner [Kemmeter] noted markings on Joshua's chin during a home visit which resembled cigarette burns," (J.A. 143) but she and DSS took no action.

On March 8, 1984, Joshua was again taken to the emergency room. (J.A. 140-143) He was found to be in a deep coma, with extensive old (but not new) bruising and discoloration over all parts of his body. (J.A. 125, 142, 197-198) Emergency brain surgery was done in an effort to save his life. The surgeon found massive pools of yellow liquid, consisting of the byproducts of old intracranial hemorrhages (that is, the old blood clots had been there long enough that the red blood had chemically decomposed, and only the yellow bilirubin element remained). (J.A. 141-142) The membrane covering the brain was stained blue, again by reason of the long-term standing and pooling of blood in the brain and the skull. Both

of these are unequivocal evidence of brain damage and physical trauma to the head over a long period of time. (J.A. 142) The traumas had been inflicted on Joshua well before their cumulative effects eventually put Joshua into a coma and rendered his condition irreversible.

Throughout the time she was handling Joshua's case, the caseworker knew that he had a natural mother (petitioner Melody DeShaney), who the mother was, and that the mother was from Cheyenne, Wyoming, where the marriage, Joshua's birth and the divorce had occurred. (J.A. 153) The caseworker had ample means of contacting the mother, but did not do so, despite clear agency and professional guidelines to do so (and thus enlist another adult to protect Joshua). When it appeared that Joshua would die imminently the caseworker did, for the first and only time, contact the mother, to tell her that Joshua was dying. (J.A. 132)

When the natural mother and grandmother arrived in Oshkosh, Winnebago County, Wisconsin, the caseworker told them, "I just knew the phone would ring some day and Joshua would be dead." (J.A. 107-108)

Joshua has lost nearly half the tissue in his brain, is permanently substantially paralyzed, and is profoundly and permanently retarded and brain damaged. (J.A. 134-135)

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SUMMARY OF THE ARGUMENT

This case presents two questions: first, whether Joshua DeShaney, who was being systematically abused

and neglected by his father and the father's resident paramour, had a liberty interest which is protected by the Fourteenth Amendment, such that its violation can be actionable under the provisions of 42 U.S.C. § 1983 (and, separately, whether his noncustodial, nonabusing mother Melody DeShaney's parental rights are actionable here); and, second, if so, whether actions of the child protection authorities which are greater than negligence, but short of actual intent, can trigger liability under § 1983.

Petitioners urge, first, that a child who is known by the designated child protection authorities to be in actual danger of severe physical abuse or neglect has a constitutionally protected right to appropriate protection. In addition to the right simply to live, and the more general rights of family association, education and marriage, the child enjoys the right to be free from infliction of unnecessary pain and the right to physical safety and integrity. The urgency of the right is still clearer where, as here, the authorities actually undertake to protect and care for the particular endangered child.

Separately, where a state statute creates a duty of child protection and enunciates guidelines to assure proper protection, the child also enjoys an entitlement to that protection which is constitutionally protected under *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Extreme misconduct, however labelled, is actionable in such a setting. *See Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *Pet. for cert. filed*, Dkt. No. 87-521, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987); *see also Estelle v. Gamble*, 429 U.S. 97 (1976). To hold otherwise would encourage child protection authorities to refuse to

act, would reward inactivity of public officials charged with important affirmative duties, and would defeat one of the primary values of this or any other free society, the safety of children.

Joshua DeShaney has been deprived of his constitutionally protected rights in circumstances where even minimally competent actions by the designated authorities would in all likelihood have sufficed to save him. Instead the authorities merely collected the mounting and eventually overwhelming evidence of the systematic abuse and neglect he was suffering. (J.A. 129-131, 143-144) They knew of and repeatedly observed personally the frequent incidents of significant suspicious injuries, including cigarette burns to his face (J.A. 118, 130, 143), lacerations to his cornea (J.A. 118) and injury to his penis (J.A. 113). They received numerous reports of abuse and neglect from other sources, including physicians and nurses (J.A. 120), a hospital (J.A. 116, 120), the police (J.A. 153), a relative (J.A. 153) and a Head Start social worker (J.A. 118, 177). They considered that his was a case of child abuse (J.A. 109-110) and requested and assigned in this one case only a teammate to help monitor Joshua. (J.A. 108) They had actual knowledge of significant medical symptoms suggestive of brain damage, and knew he was not receiving medical care. (J.A. 131) The caseworker later told witnesses she had expected that Joshua would eventually die of child abuse. (J.A. 107) Whether the respondents' refusal to act in the face of all these circumstances is labelled gross negligence, deliberate indifference, or willful and wanton misconduct is of no moment; under any rubric it far exceeds our notions of ordinary negligence, and hence

passes the bar of *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986).

This child enjoyed important fundamental rights, including the right to be protected by the state, or the right at least to receive protective services in a manner other than gross negligence or deliberate indifference. His rights were seriously violated over a protracted period of time and he remains brain damaged for life as a result. He has stated a proper cause of action and should be permitted to go forward with his proof.

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ARGUMENT

I: An Endangered Child Has A Constitutionally Protected Due Process Right To Receive Appropriate Protection Where The Public Officials Charged With That Responsibility Have Actual Knowledge Of The Child And His Plight And Actually Undertake To Protect Him.

A: The Importance of a Child's Safety and the Intimate Relationship between an Endangered Child and a Child Protection Agency Which Knows of His Plight and Undertakes to Protect Him from a Specific Known Danger Establish a Constitutionally Protected Right to at Least Minimum Levels of Protection.

The first point of inquiry is the existence of a protected right which may be alleged to have been violated or deprived. *Baker v. McCollan*, 443 U.S. 137 (1979).

One must distinguish at the outset between the presence of a protected civil right and the subsequent require-

ment of causation and foreseeability of harm in the context of causation.[1] Where such duty exists, the federal courts have consistently recognized § 1983 liability for refusal to act, as for example when police officers neglect their duty to enforce the laws. *See, e.g., Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972); *see also Fundiller v. City of Cooper City*, 777 F.2d 1436, 1441-1442 (11th Cir. 1985); *Ware v. Reed*, 709 F.2d 345, 353 (5th Cir. 1983); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983). Similarly the First Circuit, in *DiMarzo v. Cahill*, 575 F.2d 15 (1st Cir. 1978) found § 1983 liability where an official's failure to carry out state law duties resulted in prison conditions below the minimum standard of the Fourteenth Amendment (and not just violation of state law minimum standards). *See also White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police officers had a duty to protect minor children from immediate hazards after they arrested the children's guardian).

In analyzing Fourteenth Amendment violations, the courts have relied on a two-stage analysis. The first element is whether the individual's interests are encompassed within the Fourteenth Amendment's protection of life, liberty and property. If so, the court must then decide what procedures constitute "due process of law." *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

As a broad proposition there is no generalized duty on a state or municipality to provide affirmative protection

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[1]*See* Eaton, *Causation in Constitutional Torts*, 67 Iowa L. Rev. 443, 479 (1982): "Resolving the threshold question of duty in terms of causation can only confuse both issues. Greater clarity and precision would be achieved if courts would recognize the distinction between duty and causation and analyze each in its own terms."

to members of the public at large. *Martinez v. California*, 444 U.S. 277 (1980). Such duty, and the individual's corresponding right, may arise out of the relationship created or undertaken by the state with respect to certain parties.

This Court recognized an affirmative duty to provide protection in the Eighth Amendment context in *Estelle v. Gamble*, 429 U.S. 97 (1976). It has subsequently bridged the gap between the Eighth Amendment setting and the broader Fourteenth Amendment context. For example, in *Youngberg v. Romeo*, 457 U.S. 307 (1982) the Court recognized a right to affirmative care and found a Fourteenth Amendment liberty substantive due process interest in a mental health setting, saying the "right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Id.* at 315.[2]

Every Circuit Court which has considered this issue, with the sole exception of this present case, has in a variety of child-concern contexts affirmed the need and the right of the child to special consideration from the state.

Considering specifically the context of child protection, the Second Circuit held that the Fourteenth Amendment creates, and guarantees the child's right to, an affirmative duty of protection in *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981),

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[2]Two years earlier, in *Martinez v. California, supra*, the Court held that the causal connection between the State's actions and those of its parolee were too attenuated to impose liability (despite the fact that he was still in legal custody), but the Court held open the possibility that in another setting the Fourteenth Amendment right could be used in a § 1983 action. 444 U.S. at 285.

cert. denied, 464 U.S. 864 (1983). In *Doe* the Commissioner of Welfare, as legal custodian, arranged for foster placement and contracted for another agency to supervise the home and make periodic reports. The Court held that, by failing to protect an individual who was either in its custody or under its care, the state violated a constitutionally protected liberty interest. *Id.* at 141. The *Doe* court made clear that legal custody was not essential to the existence of the constitutionally protected right to appropriate protection.

In *Jensen v. Conrad,* 747 F.2d 185, 194 (4th Cir. 1984) the Fourth Circuit said on facts highly similar to but less pressing than those in this case that "a right to affirmative protection need not be limited by a determination that there was a 'custodial relationship.'" The *Jensen* court found that liability was uniquely avoided on the facts of the case, and restricted the holding to the particular facts of that individual setting, saying: "Were the issue properly before the court on different facts, there would be nothing to preclude further definition of the meaning of that term followed by a ruling that the facts of that case fell within the meaning of 'special relationship.'" *Id.* at 194-195.

The *Jensen* court left open the contours of the "special relationship" notion and mentioned several factors it felt should be included in any such analysis. These were (a) whether either the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident; (b) whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and (c) whether the state knew of the victim's plight. *Id.* at 194-195 n. 11.

The first of these suggested criteria is aimed at whether the defendants had reason to be aware that the particular victim, as opposed to the world at large, faced a special danger or that a particular individual created a special risk of harm. The second looks to the desire of the state affirmatively to locate and protect children at risk for abuse or neglect. The third looks to the extent of the state's proclaimed intent to offer affirmative protection. The *Jensen* court noted that knowledge of the children's plight strengthened the argument that a special relationship existed and that a correlative duty to protect had been established.

The Third Circuit considered the same question in *Estate of Bailey by Oare v. County of York,* 768 F.2d 503 (3d Cir. 1985), and employed the *Jensen* court's suggested criteria. *Id.* at 509. There, as here, a small child lived with a natural parent and the parent's paramour. There, as here, there was an accusation of the paramour's having struck the child, and an initial hospitalization and examination. There, as here, the examing medical staff felt they were dealing with an abuse situation and so advised the child protection agency. There, as here, the recommendation was made that the paramour be kept away from the child. There, as here, the welfare agency initially arranged for placement away from the home, and then returned the child to the home. There, the agency did not investigate or know where the paramour was or what the home conditions were, whereas here that information was at hand and was adverse to the child's interests and to the agency's own recommendations. There, the child died within a month, whereas here the child continued to be abused systematically while the DSS continued to annotate the

observed signs of abuse and neglect for almost a year and a half.

The Third Circuit noted that not only did the agency have notice of the child abuse, but that it was aware that the individual child "as distinguished from the public at large, faced a special danger." *Id.* at 510, citing *Martinez*, 444 U.S. at 285. "When the agency knows that a child has been beaten, [t]his strengthens the argument that some sort of special relationship has been established." *Bailey, supra,* at 510-511, citing *Jensen*, 747 F.2d at 195 n. 11. In this setting the court held that the agency had an affirmative duty to protect the child.

The Eleventh Circuit considered these same issues in *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc). Viewing the question of constitutional protection of a child's rights in accord with the Second, Third and Fourth Circuits, the court held that those rights exist and would be violated by gross neglect or deliberate indifference of a child protection agency, and further held that the state's statutory scheme created a right to protection that could not be denied without due process.

Analyzing the liberty interests of an endangered child for Fourteenth Amendment purposes, the court said: "The liberty interests in this case are the right to be free from the infliction of unnecessary pain, as that interest is protected by the fifth and fourteenth amendments, and the fundamental right to physical safety as protected by the fourteenth amendment." *Id.* at 794 (footnote omitted).

It went on to say that it was the state's "action in assuming the responsibility of finding and keeping the child in a safe environment [which] placed an obligation

on the state to insure the continuing safety of that environment." *Id.* at 795.

The court was careful to enunciate that it is not a formal legal relationship which gives rise to the right to protection and safety. Referring to *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), the court pointedly noted that the "*Bowers* court refused to distinguish between custodial relationships and 'other relationships created by the state.'" *Id.* at 798. It also cited the Fourth Circuit in *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983), to make clear that a right to protection may arise "out of special custodial *or other relationships* created *or assumed* by the state in respect of particular persons." *Id.* at 798 (emphasis supplied).[3] The court held that the relationship between a child protection agency and the endangered child was so significant in the child's life as to establish a due process right which is actionable when violated by deliberate indifference.

The *Ledbetter* court separately reviewed the child's claim that state law and action in child protection had created an entitlement protected by the Fourteenth Amendment and enforceable under § 1983, under the approach used by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Reviewing in detail the Georgia child protection statutes, the court discerned a demonstrated intention to bestow benefits to endangered children, and further noted

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[3]Note that *Doe, supra,* also speaks of either custody or care, and also that the Seventh Circuit used the same language in *White v. Rochford, supra.*

the statutes set out specific guidelines and criteria to further that intent, and found that a *Roth*-type right had been created.

Going to the heart of the matter, the court said:

> "It is of no moment that the state officials are not charged in this case with affirmatively acting to harm this child. What the child is entitled to is the state's protection from harm. She is entitled to be protected in the manner provided by statute. It would be anomalous if the state, in allegedly acting to protect the child, could itself cause harm to the child by failing to assume the child's minimal physical safety. Failing to act may, under certain circumstances, be more detrimental than acting." *Id.* at 800.

The decisions of all of the Circuit Courts which have considered this matter, then, outside of the present case, recognize that the endangered child does have a constitutionally protected right to receive appropriate protection from the designated child protection authorities.

The viability of the noncustodial mother's rights are dependent, of course, on the viability of the child's claim. Where the child enjoys a constitutionally protected right in this situation, which is then violated by aggravated official misconduct, her constitutionally protected right to the enjoyment of a relationship with her son is effectively violated by that action. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1242-1248 (7th Cir. 1984).

Looking to the criteria the Fourth Circuit suggested in *Jensen*, for example, and to the purposes behind them, it is clear that each of them is applicable to Joshua's case. The respondents knew who Joshua was, and that he was at risk for child abuse (J.A. 108-109, 116-120, 129, 153),

and even arranged for temporary custody at one point. (J.A. 111) The DSS knew that the paramour was a probable abuser of Joshua, since the first medically-reported abuse complaint involved a time when she alone was with the child (J.A. 129), and since at that time the father informed DSS directly that he felt she had abused Joshua. (J.A. 113) Further, the first report DSS ever had about Joshua, from the father's previous wife via the police department, noted that Joshua "is a prime case for child abuse," referring in that instance to the father himself as the abuser. (J.A. 153)

Second, the state and the county had expressed specific policies and intentions to seek out and prevent child abuse. (*See* discussion of Chapter 48, Wisconsin Statutes and the policies of the County and its DSS under that Chapter, *infra*).

As to the third element, the County and its DSS knew Joshua intimately, they made detailed note of every emergency room visit, they personally observed repeated suspicious traumas to the child (injuries to the penis, cigarette burns to the face, a scratched cornea, inexplicable lesions, etc.). (J.A. 110-121, 129-131) The caseworker was so suspicious of child abuse that, for the one and only time in her long career, she obtained a teammate to help her with Joshua (J.A. 108-109), and told the teammate she felt Joshua was being abused (J.A. 109); the teammate viewed it as an abuse case. (J.A. 110) The caseworker subjectively believed, and later admitted she had believed, that Joshua would someday die of child abuse. (J.A. 107)

The County had effectively ignored the first report of child abuse (J.A. 153), and at the second report arranged for temporary custody of the child pending an investiga-

tion. (J.A. 111) That effort resulted in a reluctant return of the child to the dangerous home with the written promise to take immediate formal action upon the occurrence of any additional suspicious trauma. (J.A. 159-160) It also resulted in a written contract with the father for the child's protection. (J.A. 113) The promise and the contract were both ignored, forgotten as soon as they were written, and repeated injuries, warnings, child abuse reports and neglect reports were received and ignored by the DSS. The County and its DSS affirmatively took on the care of Joshua, and at least once his custody as well, and unilaterally returned him to the abusive home with nothing more than a token promise they never tried to keep. The respondents continued their efforts for Joshua's ostensible "care and protection" for more than another year, so that by the time he was permanently brain damaged they had collected a massive file of information to utilize in the eventual (and inevitable) criminal prosecution. But their responsibility for Joshua's care had been profoundly neglected to such a conscience-shocking extent that it violates the most basic precepts of this society and constitutes a substantive due process deprivation within the meaning of *Rochin v. California*, 342 U.S. 165 (1952).

On these facts, and under the reasoning described, the conclusion must follow that Joshua had a right, a liberty interest in being protected from foreseeable, and actually-seen, child abuse.

The DSS and its caseworker neglected Joshua in another important respect as well. The Wisconsin statute defining "neglected child" [Chap. 48, Section 48.981(1)(d)] provides: "'Neglected child' means a child whose

parent, guardian, legal custodian or other person exercising temporary or permanent control over the child neglects, refuses or is unable for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." The caseworker documented in the casefile that the father and the girlfriend told her, while she was in the home on March 7, 1984, that Joshua had been fainting, had been falling down, and had lost consciousness, and complained of headaches, and that he had struck his head on a toilet. (J.A. 130-131, 179) They also told her that the child had received no medical care although the condition had already persisted for some time, and that they had no plans to seek medical care for him (but that they would do so if it "kept up"). (J.A. 131, 179) Despite the plain need to have the child seen by a physician, and the fact that this same "head striking the toilet" excuse had been offered by the adults (J.A. 120) subsequent to the uninvestigated November 30, 1983 hospital report to DSS of suspected child abuse (which excuse DSS had also accepted without inquiry on that occasion even though the caseworker was skeptical) (J.A. 120), no action was taken. This is very serious medical neglect, both in terms of common experience and in terms of the Wisconsin neglect statute, *supra*: the child was plainly being deprived of needed medical care, and the caseworker knew it, yet did nothing. The caseworker neglected even the rudimentary step of seeing the child, although he was in the next room. (J.A. 131)

This is especially significant in light of the medical and surgical findings the very next day. Joshua's head

was marked with a number of old bruises, mostly brown or dark brown in color, indicating they had been present a substantial length of time; yet no new, fresh bruises were seen. In surgery his skull was found to be intact and without fractures, but his meninges were seen to be stained blue, indicating that there had previously been blood there for a long period, yet no new, fresh blood was seen. When his brain was surgically opened, the physicians found quantities of yellow matter consisting of old blood which had chemically decomposed, indicating that it had been present a long time, yet no fresh bleeding was seen. As the physicians noted, the damage to Joshua's brain was caused by a protracted series of traumatic events over a long period of time, creating long-standing bleeding within the brain. (J.A. 125, 141-142) It is clear that the losses of consciousness the last several weeks of his "normal" life, the falling down, the complaining of blurring vision and headaches, related to the increasing pressure within his brain of the accumulating pockets of blood which were gathering.

Even as late as the March 7 visit of the caseworker, timely medical intervention could, and likely would, have prevented the permanent brain damage which ensued once his brain finally gave out. Merely securing a visit to a doctor could have saved this child, and the caseworker had actual notice of compelling reason to insist that be done, or to do it herself.

It should also be noted that children are constitutionally entitled to protections which may not be available to adults. Speaking in another setting, former Chief Justice Burger wrote:

> "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. . . . The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Palmore v. Sidoti*, 466 U.S. 429, at 433 (1984).

This dictum reflects fairly the recognition of our society that children are, after all, inherently different and therefore needful of appropriately different constitutional protections. Where, as in the passage above, the high duty of the state to protect children is considered sufficient for Equal Protection purposes, it must necessarily be sufficient for the broader application of the Due Process Clause. Process can hardly be both due and unequal.

Petitioners would also urge in this regard that Joshua had a protected liberty interest in his equal access to the services which the state and county undertook to provide for all endangered children, on a basis which did not arbitrarily single him out for grossly negligent and deliberately indifferent "protection." *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The state or county may have been free originally to refrain from providing any child protective services, but having proclaimed a formal statutory policy of providing such services and having actually engaged for years in providing them, and having provided them adequately to many other children (and perhaps provided them carelessly or negligently to others), they may not single Joshua out arbitrarily by refusing to provide him appropriate protection and by treating him, unlike all the other children, in a grossly negligent, de-

liberately indifferent or willful and wanton manner. To single him out for egregious mistreatment is to deprive him without due process of a right to which he was entitled. *Taylor v. Ledbetter, supra.* As Justice Stevens noted in his dissent in *Hewitt v. Helms*, 459 U.S. 460 (1983), where public officials treat one individual differently from all others, absent some overriding justification, the protections of the due process clause will be implicated. *Id.* at 485 (dissenting opinion).[4]

B: A Statute Mandating and Promising Child Protection Creates a Due Process Entitlement in the Child Which May Be Enforced Under Section 1983; The Provisions of the Applicable Wisconsin Child Protection Statutes Create Such an Entitlement.

This Court confirmed in *Board of Regents v. Roth*, 408 U.S. 564 (1972), discussed *supra*, that in appropriate circumstances a state statute may create a benefit which amounts to an entitlement and which enjoys due process protection. *Taylor v. Ledbetter, supra.* In *Board of Pardons v. Allen*, 107 S.Ct. 2415 (1987) Justice O'Connor in dissent reviewed this concept and noted that, to give rise to a constitutionally protected right, the statute in question must create an entitlement, not a mere expectancy, and

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[4]The requirement is that all members within the particular protected class (e.g., children) be treated evenly, at least so that one is not treated exceptionally worse than the others; it is not that separate classes (e.g., children and prisoners) must be treated alike in all respects. There are certainly good reasons for treating prisoners differently than small children. It is fruitful to contemplate, in this regard, the painful regularity with which child abuse victims grow up to lives of crime and violence, and the power of society's interest in protecting itself from future crime by caring for endangered children today.

suggested that "the statute must act to limit meaningfully the discretion of the decisionmakers." 107 S.Ct. at 2423.

The Wisconsin child protection statutes (Chapter 48, Wis. Stats., commonly referred to as "The Children's Code") are clear and specific in their intent affirmatively to recognize and protect children who are endangered by abuse or neglect. Sec. 48.01 details at length the state's desires for the benefit and protection of children. In view of their length, § 48.01 ("Title and legislative purpose") and § 48.981 ("Abused or neglected children") are submitted in the Appendix to this brief.

The Children's Code defines the relevant terms, including "abuse" and "neglected child." § 48.981(1). It provides in considerable detail for reporting of suspected abuse and neglect, and creates an absolute duty of mandatory reporting imposed on a variety of persons, particularly police, educators, health care professionals and social workers. Sec. 48.981(2) provides that a designated professional who has "reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected *shall* report as provided in sub. (3)." (emphasis supplied). The duty to report, and the duty to act on the report of a designated professional encompasses not only respondents Kemmeter and Stelse (J.A. 164-166) but also the Head Start social worker who telephoned to DSS reports of her observations of neglect of Joshua three times over two days, without response. (J.A. 118, 177)

The mandatory duties of the county department of health and social services (DSS) are set forth in § 48.981

(3)(c). These nondiscretionary obligations include initiating an investigation within twenty-four hours after any report or indication of abuse or neglect is received, and performing the investigation thoroughly. It must be conducted in accord with standards previously set up by the department for child abuse and neglect investigations, and must, if possible, include seeing or talking with the child. The county department is obligated to keep a record of all its actions in connection with each report received, with specified mandatory information. The DSS is required to update the record every six months until the case is closed. The DSS is required to report separately to the individual who made the initial report of suspected abuse of its actions, and must do so within sixty days. It is required to coordinate the furnishing of services to abused and neglected children and their families. The DSS is required to provide relevant data to the state DSS on every investigation it conducts. Importantly, the DSS is mandated to make a determination, within sixty days of receiving a report of abuse or neglect, as to whether abuse or neglect has occurred or is likely to occur. Respondents' own expert confirmed that this means, both formally and in practice, that each time new information suggestive of abuse or neglect is obtained, from outsiders or from the caseworker's own observations, a new formal investigation is mandated by the statute. He confirmed, also, that the new or continuing observations of the caseworker herself trigger a new duty, each time new indicia of abuse or neglect are noted, to report and to initiate new formal investigations. (J.A. 164-166)

This statutory scheme effects at least one other significant result. Every person described is obligated to

report suspected abuse and neglect, either to the DSS directly or to the police (who are in turn then obligated to refer the matter promptly to the DSS). Only the DSS is authorized (or required) to investigate the suspicion of abuse or neglect, and only the DSS is empowered to do anything about it, including bringing the matter to court for hearing and determination. Every other person outside DSS, although obligated to report to DSS, is utterly disabled from acting on behalf of the endangered child. Everything must go to DSS, and only DSS is authorized to act. Thus all the natural allies of an endangered child—a doctor or nurse, a police officer, a teacher, a relative, a neighbor—who might ordinarily be expected to intervene to help an endangered child are, under this statute, handcuffed. They (and the child) must hope that DSS does its job properly, at the risk of the child's life and health. This preemption by the DSS under the Children's Code significantly impacts, adversely, the natural ability of a child, or more accurately the ability of those around him, to protect him. Preemption is an important additional factor to be considered in calculating the special relationship between this actually-known endangered child and the DSS which not only promised to protect him but stripped him of the other persons who could, absent this scheme, have intervened on his behalf.

Under this statute the discretion of the authorities of the DSS is severely restricted. The response to a report, the short time for starting the investigation, the requirements for reporting to the state and to the person who originally reported the concern, and the rest of the mandates leave little if any room for doing anything other than carrying out the terms of the statute. It should be

noted, too, that there is absolutely no discretion about the duty to make full-fledged new investigations each time new indicia of abuse or neglect arise and no question that was not done here.

Thus, on the particular facts of this case, the respondents may not be heard to argue that they indeed have abundant discretion under the statute, since any room for judgment under the statute arises only later, after the prompt and thorough investigations have been carried out and it is time to evaluate the fruits of the new investigations. Here, the first report received was treated summarily (J.A. 153), the second resulted in a written contract for the child's benefit which was violated immediately (J.A. 113), and every subsequent report (from hospitals, nurses, Head Start personnel, and direct caseworker observation) generated no new investigation whatever (despite the mandate of the statute; despite the caseworker's promise in her original written report to the file to take the child directly into court upon finding any new evidence of abuse or neglect (J.A. 159-160, 116-121, 143-144); and despite her own fear and belief that Joshua was likely to die in that home). (J.A. 107-109) In every instance but one the mandatory investigation was simply omitted. The mandatory coordination with the police was not done (else, DSS would have received the police reports on their experience of the violence in the DeShaney home). (J.A. 144-145)

The respondents did not perform the functions and duties which were mandated under the statute and about which they had no choice. They may not properly argue that, having omitted the nondiscretionary essential first

steps, they then exercised some professional judgment or discretion on the basis of the very information they were required, but had failed, to obtain. (J.A. 144-145)

Petitioners urge that the scheme of the Children's Code is sufficiently extensive and detailed, and impacts heavily enough upon an endangered child (especially by taking away his natural allies and subjecting him exclusively to the actions of DSS) that it more than meets the test of *Board of Regents v. Roth, supra,* and that it creates an entitlement which the authorities may not take away without due process of law. In view of the facts of this case it is clear that the defendants violated not only their mandatory statutory duties but also Joshua's due process rights arising under the statutory scheme.

II: The Misconduct Of The Respondents In This Case Was Far Beyond Mere Negligence And, However Designated, Was Sufficiently Aggravated To Establish Liability Under Section 1983.

Daniels v. Williams, 474 U.S. 327 (1986) and *Davidson v. Cannon,* 474 U.S. 344 (1986), *supra,* left for later decision the question of § 1983 liability for conduct greater than negligence but short of actual intent to achieve harm. In this case the Seventh Circuit acknowledged that the Child Protection Agency's "inexplicable failure to act" was sufficiently excessive on the facts to pass the barrier created by *Daniels* and *Davidson,* and felt no need to decide whether to label the wrongful conduct as gross negligence, or willful and wanton misconduct, or deliberate indifference.

Petitioners believe that government conduct rising to such a level does trigger Sec. 1983 liability, under *Estelle*

v. Gamble, 429 U.S. 97 (1976), and *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir., 1987), both discussed *supra*.

Sound constitutional analysis supports this result. First, the rationale for excluding ordinary negligence situations does not apply in the exacerbated cases. *Daniels* and *Davidson* demarked the line between errors in judgment exercised within the scope of conduct fairly to be anticipated, on the one hand, and abuse of the power of the office itself. The positive effect of *Daniels* and *Davidson* was to exclude from federal civil rights litigation under § 1983 the host of routine situations which amount, at most, to questions of the exercise of normal judgment during the course of government activity. In those cases the power may not have been used well, or skillfully, or efficiently or economically or wisely, but it cannot be said to have been abused. At the same time and for the same reason, *Daniels* and *Davidson* did not alter the application of § 1983 to governmental action depriving a citizen of a protected right where the action was taken intentionally.

The distinction between the two classes under *Daniels* and *Davidson* may be seen as the distinction between abuse of power (which is actionable) and mere misuse of power (which, under these cases, is not actionable). The difference underlying the distinction is the notion of the abuse of power, the sense of offensiveness of the governmental conduct in the context of a society of ordered liberty.

The question amounts to this: shall we consider extreme misconduct (whether we apply the rubric of "gross negligence", or "deliberate indifference", or "willful and wanton misconduct") to be a mere inadvertence which can

and should be considered a normal part of the exercise of government power by fallible human beings (which is the philosophical underpinning of *Daniels* and *Davidson*), or shall we see it as the twisting and defiling of governmental power entrusted to those same persons?

When we entrust the power of government to individuals, as any structured society must, we recognize in advance that, being human, they will make some mistakes. It seems fair not to impose constitutional liability on them for mere mistakes. In the act of entrusting, however, there is no comparable assumption that those same human beings will act with extreme misconduct (however stylized). When the errors are not mere errors, but rather extreme misconduct outside the normal range of innocent fallibility, then it is abuse of the entrusted power.

A further reason for holding extreme misconduct actionable is the practical effect of the alternative. Were the Court to hold that a refusal to act, regardless of how extreme the circumstances, or how wrongful the society views the refusal under the circumstances, could not be actionable, then the lesson taken by some public officials would be to play safe, to do nothing, always to refuse to get involved, secure in the knowledge that by refusing to act they avoid any question of being sued. In a society which holds strongly-cherished beliefs about children, and in which inactivity by some public servants is considered a problem already, for the Court to add this incentive toward spectatorship would be inappropriate.

The Court below expressed concern that child protection officials could be placed in the untenable position of being subject to liability for whichever of two competing

courses they took. This concern is misplaced for several reasons.

First, it should be noted that the Circuit Court's opinion grasped firmly onto only one, and the most extreme, option available to the DSS, termination of parental rights. It ignored the availability of a host of lesser courses of action which would have been appropriate, at least pending determination of the extent of the ongoing abuse, and which would have been effective for the protection of the child they knew to be endangered. They could have taken him to a physician for a medical exam. § 48.20(4). They could have sought a court order making the family's participation mandatory. They could have sought foster home placement. They could have enforced the contract they entered into with the father for the child's protection (and which they later renewed). They could have required the child to be enrolled in Head Start, as they had contracted and as they had determined to be necessary at the first team meeting. They could have notified the child's mother (as they promptly did, finally, when he was near death). They could have done a lot of things, far short of the major step of termination of parental rights.

Moreover, what is at issue here is the smallest cognizable fraction of all official conduct. If we assume for discussion that the greatest part of child protection in this nation is performed competently and a smaller part is performed with less diligence, perhaps extending down into what may be labelled negligence, we may safely infer still that at least 99% or more of all such activity (both that done well and that done poorly) is protected from interference by federal litigation, the former because it is not harmful and the latter because, even if harmful, it

is mere negligence and thus protected under *Daniels* and *Davidson*. Whatever the actual proportion between the two groups (good work and poor or negligent work), both together constitute the anticipated (if not always the hoped-for) range of performance of entrusted governmental power, and both are free from burden in the form of § 1983 litigation.

It is only the tiny fragment, the one percent or the one-tenth of one percent, of all such activity which is at issue here. Only conduct totally beyond negligence, and rising into the vaulted heights of extreme misconduct (whether labeled gross negligence, deliberate indifference, or willful and wanton misconduct) is to be held actionable.

Indeed, this is the way even Petitioners want it to be; we are not seeking to alter *Daniels* and *Davidson*, or make every decision by a public servant into a cause of action for the unhappy loser. We only want to take the most extreme situations, those utterly beyond the Pale, which involve the abuse of the position and power entrusted, rather than merely a mistake in judgment or a difference in opinion or approach, and afford them the relief to which they are entitled.

The Seventh Circuit's opinion suggested that, if the courts find liability even on the extreme facts of this case, the officials entrusted with child protection responsibilities would be placed "on the razor's edge," arguing that they would be subjected to alternative liability for either failing to remove a child from a home or for removing a child from a home.

Petitioners believe, instead, that what the Seventh Circuit described as a razor is really more like a huge

level field containing, off in a remote corner, one small hole. In reality, child protection workers and other public officials are already amply protected by the very rule of *Daniels* and *Davidson*. Whether their actions are skillful, or mundane, or poor, or even negligent, they are utterly protected from § 1983 liability by *Daniels* and *Davidson*. Under even the strongest view of the approach which Petitioners urge this Court to adopt, officials face potential liability only in the (hopefully) rare and unusual case where their actions are outside any acceptable bounds, where they violate not merely professional standards of judgment but where their deliberate refusal to act, in a sphere specifically entrusted to them, is so profound that it violates the community's sense of outrage and would be generally perceived as fundamentally wrong or unfair.

CONCLUSION

The decision of the Seventh Circuit and the trial court that Petitioners failed to state a claim on which relief could be granted in a § 1983 action should be reversed, and the case remanded to the district court for trial upon the merits of the case.

Respectfully submitted,

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APPENDIX

SUBCHAPTER I

GENERAL PROVISIONS

48.01 *Title and legislative purpose.* (1) This chapter may be cited as "The Children's Code". This chapter shall be interpreted to effectuate the following express legislative purposes:

(a) To provide judicial and other procedures through which children and all other interested parties are assured fair hearings and their constitutional and other legal rights are recognized and enforced, while protecting the public safety.

(b) To provide for the care, protection and wholesome mental and physical development of children, preserving the unity of the family whenever possible.

(c) Consistent with the protection of the public interest, to remove from children committing delinquent acts the consequences of criminal behavior and to substitute therefore a program of supervision, care and rehabilitation.

(d) To divert children from the juvenile justice system to the extent this is consistent with protection of children and the public safety.

(e) To respond to children's needs for care and treatment through community-based programs and to keep children in their homes whenever possible.

(f) To assure that children pending adoptive homes will be placed in the best homes available and protected from adoption by persons unfit to have responsibility for raising children.

(g) To provide children in the state with permanent and stable family relationships. The courts and agencies responsible for child welfare should assist parents in changing any circumstances in the home which might harm the child or which may require the child to be placed outside the home.

(2) This chapter shall be liberally construed to effect the objectives contained in this section. The best interests of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents or guardian of the child, the interest of the person or persons with whom the child has been placed for adoption and the interests of the public.

48.981 *Abused or neglected children.* (1) DEFINITIONS. In this section:

(a) "Abuse" means any physical injury inflicted on a child by other than accidental means, or sexual intercourse or sexual contact under s. 940.225. In this paragraph, "physical injury" includes but is not limited to severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm under s. 939.22 (14).

(b) "Child" means any person under 18 years of age.

(c) "County agency" means the county child welfare agency as defined in s. 48.56 (1).

(d) "Neglected child" means a child whose parent, guardian, legal custodian or other person exercising temporary or permanent control over the child neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care

or shelter so as to seriously endanger the physical health of the child.

(2) PERSONS REQUIRED TO REPORT CASES OF SUSPECTED CHILD ABUSE OR NEGLECT. A physician, coroner, medical examiner, nurse, dentist, chiropractor, optometrist, or any other medical or mental health professional, social or public assistance worker, school teacher, administrator or counselor, child care worker in any day care center or child caring institution or police or law enforcement officer having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected shall report as provided in sub. (3). Any other person having reason to believe that a child has been abused or neglected may make such a report. No person making a report under this subsection may be discharged from employment for so doing.

(3) PROCEDURES. (a) *Initial report.* Persons required to report under sub. (2) shall immediately contact, by telephone or personally, the county agency, sheriff or city police department and shall inform the agency or department of the facts and circumstances contributing to a suspicion of child abuse or neglect. The sheriff or police department shall within 24 hours, exclusive of Saturdays, Sundays or legal holidays, refer to the county agency all cases reported to it. The county agency may require that a subsequent report be made in writing.

(b) *Duties of local law enforcement agencies.*

1. Any person reporting suspected abuse or neglect of a child may request an immediate investigation by the sheriff or police department if the person has reason to believe that the child's health or safety is in immediate

danger. Upon receiving such a request, the sheriff or police department shall immediately investigate to determine if there is reason to believe that the child's health or safety is in immediate danger and take any necessary action to protect the child.

2. If the investigating officer has reason under s. 48.19 (1) (c) or (d) 5 to take a child into custody, the investigating officer shall place the child in protective custody and deliver the child to the intake worker under s. 48.20.

3. If the police or other law enforcement officials determine that criminal action is necessary, they shall refer the case to the district attorney for criminal prosecution.

(c) *Duties of county agencies.* 1. The county agency shall act in accordance with s. 48.57. Within 24 hours of the receipt of an initial report of suspected child abuse or neglect, the county agency shall commence an appropriate and thorough investigation to determine whether the report is "indicated" or "unfounded". The complete investigation shall, if possible, include a visit to the child's home or usual place of abode, observation of the child and an interview with the child and the child's parents or custodians.

2. Additionally, within 72 hours after receipt of an initial report the county agency shall complete and forward to the department under sub. (7) a preliminary investigative report containing the name, address, age and sex of each child involved and the type of abuse or neglect suspected. The preliminary report shall not contain any information which identifies any person other than the child.

3. An investigative report shall be classified as "indicated" or "unfounded". A finding of "indicated" for child abuse reports shall be supported by a preponderance of the evidence available to the agency; a finding of "indicated" for neglect reports shall be supported by a clear and convincing preponderance of the evidence available to the agency. Whenever there is less than the required standard of evidence indicating child abuse or neglect, the report shall be classified as "unfounded". The county agency director or his or her designee shall review and approve the investigative report prior to transmitting the report to the central registry. The person reviewing and approving the report shall not have participated in investigating the suspected abuse or neglect. A report shall not be classified "indicated" solely because the child's parent, or another person exercising temporary or permanent control over the child's care, in good faith selects and depends upon spiritual means or prayer for treatment or cure of disease or for remedial care of the child. This subdivision does not preclude a court from ordering that medical services be provided for the child, if the child's health requires it. Reports classified as "indicated" shall include a description of the services being provided to the child and those responsible for his or her care, as well as all relevant dispositional information, and shall be updated at 6-month intervals. The agency shall make findings as required under this subdivision no later than 60 days after receipt of an initial report, and shall immediately transmit the investigative report to the central registry under sub. (8).

4. After transmitting its investigative report to the central registry, the agency shall destroy its reports con-

cerning cases of child abuse or neglect classified as "unfounded".

5. If the person investigating on behalf of the county agency has grounds to take the child into custody under s. 48.08(2) or 48.19(1)(c), the person shall place the child in protective custody and shall deliver the child to the intake worker under s. 48.20.

6. The county agency shall take necessary steps to protect other children in the home.

7. The investigator shall inform any person required to report suspected cases of child abuse or neglect that the report was unfounded or that steps were taken to protect the health and welfare of a child who is the subject of a report made by the person. At least one contact shall be made under this subdivision within 60 days after receipt of the initial report by the agency.

8. The county agency shall cooperate with law enforcement officials, courts of competent jurisdiction and other human service agencies to prevent, identify and treat child abuse and neglect. To the extent possible, the county agency shall coordinate the development and provision of services to children found to be abused or neglected under this section.

9. The county agency shall forward a copy of its investigative report of alleged child abuse or neglect alleging that a child's safety is endangered, classified as "indicated" or "unfounded", to the central registry under sub. (8).

(d) *Indepenednt investigation.* If an agent of an investigating agency is the subject of the initial report, an independent investigation shall be conducted by the department or by another agency designated by the department.

(4) Immunity from liability. Any person or institution participating in good faith in the making of a report, ordering or taking of photographs or ordering or performing medical examinations of a child under this section shall have immunity from any liability, civil or criminal, that results by reason of the action. For the purpose of any proceeding, civil or criminal, the good faith of any person reporting under this section shall be presumed.

(5) Coroner's report. Any person or official required to report cases of suspected child abuse or neglect who has reasonable cause to suspect that a child died as a result of child abuse or neglect shall report the fact to the appropriate medical examiner or coroner. The medical examiner or coroner shall accept the report for investigation and shall report the findings to the appropriate district attorney, the department, the county agency and, if the institution making their report initially is a hospital, to the hospital.

(6) Penalty. Whoever wilfully violates this section by failure to file a report as required, may be fined not more than $100 or imprisoned not more than 6 months or both.

(7) File of preliminary reports. The department shall maintain preliminary reports filed under sub. (3)(c)2 in a separate file. The reports shall not be copied or duplicated, and all information contained therein shall be confidential except as provided in this subsection. The department may, in response to an inquiry from a county

agency about a specific child, notify the agency only that a preliminary report has been filed which names the child and identify the county agency which filed the report. Each preliminary report shall be destroyed 60 days after receipt. No information from the preliminary report may be placed in the central registry.

(8) CENTRAL REGISTRY. (a) The department shall maintain a confidential statewide central registry of child abuse and neglect reports made under sub. (3) (c) (3). The registry shall receive and maintain written reports under sub. (3) (c) 3 from county agencies of suspected child abuse or neglect cases and shall transmit information to authorized persons and agencies under sub. (10).

(b) The central registry shall be operated in such a manner as to enable the department to:

1. Provide historical information to aid local child protective service agencies in determining adequate and necessary services for abused children and their families, including immediate identification and location of prior reports of child abuse and neglect.

2. Serve as a case management tool for the department in reviewing the adequacy of local child protective efforts.

3. Aid research efforts aimed at increasing the general knowledge of child abuse and neglect.

(c) Reports of child abuse and neglect shall be maintained at the central registry in one of 2 categories: unfounded or indicated.

1. A report may be classified as "indicated" only when such a finding is supported by the required standard

of evidence available to the county agency, as provided in sub. (3) (c) 3. Indicated reports may be maintained in the central registry only when supplemental information as required under sub. (3) (c) 3 is attached.

2. A report determined by the county agency to be "unfounded" shall be classified "unfounded by reason of insufficient evidence".

(d) Investigative reports classified as "indicated" shall contain the following information: the names and addresses of the child and the child's parents or other persons responsible for his or her health and welfare; the child's age, sex and race; the nature and extent of the child's abuse or neglect, including any evidence of prior injuries, abuse or neglect, to the child or siblings; the names of the person alleged to be responsible for the abuse or neglect; family composition, including names, ages, sexes and races of other children in the home; demographic data related to census tract data; the source of the report; the person making the report, his or her occupation, and where the reporter can be reached; and the medical, legal or social disposition, including a description of any services provided. The names, addresses and all other identifying characteristics of persons named in such investigative reports shall not be placed in the central registry until the requirements of sub. (9) are met.

(e) Investigative reports classified as "unfounded" shall contain all the information required under par. (d) except names, addresses and other identifying characteristics of the persons specified in par. (d).

(f) An "indicated" report and all names, addresses and other identifying characteristics placed in the central

registry from an "indicated" report shall be destroyed 7 years after receipt of the report, unless representatives of the county agency show good reason why the information should not be destroyed.

(9) NOTIFICATION AND HEARING. (a) Within 24 hours after receipt of an investigative report classifying any cases as "indicated" under sub. (3) (c) 3, a notice of the finding shall be sent by registered mail or by personal contact from the department to the suspected person. The notice shall contain the following information:

1. An explanation of the finding of "indicated".

2. An explanation that unless a hearing is requested within 15 days from the date of the notice, the names, addresses and other identifying characteristics of persons named in the report shall be placed on the central registry.

3. A description of individuals and institutions who have access to information contained in the central registry.

4. An explanation of the procedure for requesting a hearing, a brief description of the purpose of the hearing and the hearing process, including a statement that the hearing will be held no later than 30 days after a request is made, and a statement that the suspected person has a right to representation by counsel at the hearing at his or her expense.

(b) The department shall keep a record of the notice indicating the manner in which notice was given, the name and position of the person giving notice, the name of the person notified and the time and place of the notification. The information contained in this record shall not be

placed on the central registry until the deadline for requesting a hearing has passed without a request being made or if a request for a hearing is made, until after a decision by the hearing examiner sustaining the finding of "indicated" in the investigative report.

(c) The suspected person shall have a right to a hearing no later than 30 days after the request is made. The person has a right to a hearing to determine whether the finding of "indicated" in the investigative report is based on inaccurate or insufficient evidence which would justify reclassifying the report as unfounded or modifying the information to be placed on the central registry consistent with the findings of the hearing examiner. The county agency shall be given notice of the hearing and the burden of proof in the hearing shall be on the county agency. In the hearing, the fact that there was a court finding of child abuse or neglect shall be presumptive evidence that the report was substantiated.

(d) The department shall comply with the findings of the hearing examiner regarding the reclassification of a report or the modification of information to be placed on the central registry and if the report is reclassified as "unfounded", shall destroy the report but may maintain in the central registry the information specified in sub. (8) (e). Any notices, records and other documents relating to the hearing shall be confidential and shall not be made available to any individual or institution except by court order.

(10) CONFIDENTIALITY. (a) 1. All reports and records made under this section and maintained by the department,

county agencies, the central registry and other appropriate persons, officials and institutions shall be confidential, except that confidentiality of and access to preliminary investigative reports maintained by the department shall be governed solely by sub. (7). Information shall not be made available to any individual or institution except to:

a. The subject of any report, except that the department or other governmental agency shall not release data that would identify the initial reporter;

b. Appropriate staff of the department or county agencies, who may release information to their agents or to an attending physician for treatment and diagnosis, but prior reports or a lack of prior reports shall not be the basis for the determination of whether child abuse or neglect has occurred;

c. Any court conducting child protective proceedings or any court conducting dispositional proceedings under subch. VI in which child abuse or neglect is an issue; and

d. Any person engaged in bona fide research, with the permission of the department, provided, however, that information identifying the subjects of the reports and the reporters shall not be made available to the researcher.

2. Notwithstanding subd. 1, if the parents are the subject of a report, they may authorize the information to be made available to other persons. The authorization shall be in writing.

3. In this paragraph:

a. "County agency agent" means a foster parent or other person given custody of the child or a human service professional of a community board under s. 51.42 if the professional is working with the child under contract with or under the supervision of the county agency.

b. "Subject" means the child, parents and any person who is alleged or determined to have abused or neglected the child, who is mentioned by name in a report.

c. "Reporters" means all persons and institutions who report abuse or neglect under this section.

(b) Any person who violates this subsection, or who permits or encourages the unauthorized dissemination or use of information contained in the central registry and in reports and records made under this section may be fined not more than $1,000 or imprisoned not more than 6 months or both.

(11) EDUCATION, TRAINING AND PROGRAM DEVELOPMENT AND COORDINATION. (a) The department and county agencies to the extent feasible shall conduct continuing education and training programs for state and county department staff, persons and officials required to report, the general public and others as appropriate. The programs shall be designed to encourage reporting of child abuse and neglect, to encourage self-reporting and voluntary acceptance of services and to improve communication, cooperation and coordination among all agencies in the identification, prevention and treatment of child abuse and neglect. The department and county agencies shall develop public information programs about child abuse and neglect.

(b) The department shall to the extent feasible ensure that there are available in the state administrative procedures, personnel trained in child abuse and neglect,

multidisciplinary programs and operational procedures and capabilities to deal effectively with child abuse and neglect cases. These procedures and capabilities may include, but are not limited to, receipt, investigation and verification of reports; determination of treatment or ameliorative social services; or referral to the appropriate court.

(c) In meeting its responsibilities under par. (a) or (b), the department or a county agency may contract with any public or private organization which meets the standards set by the department. In entering into the contracts the department or county agency shall give priority to parental organizations combating child abuse and neglect.

(12) ANNUAL REPORTS. No later than August 1 of each year the department shall prepare and transmit to the governor and the legislature a report on the status of child abuse and neglect programs. The report shall include a full statistical analysis of the child abuse and neglect reports made through the last calendar year, an evaluation of services offered under this section and their effectiveness, and recommendations for additional legislative and other action to fulfill the purpose of this section. The department shall provide statistical breakdowns by county, if requested by a county.